at common law, having failed to provide "a proper appliance namely a tree trunk with properly cleaned steps" resulting in the respondent slipping and falling. In other words, the appellant had failed to provide a reasonably safe system of work for the respondent. As Lord Tucker pointed out in *General Cleaning Contractors, Ltd.* v. *Christmas, supra,* at page 198:

"... it is eminently desirable before condemning a system in general use that it should be clearly established by evidence that some other and safer system is reasonably practicable and that its adoption would have obviated the particular accident which has occasioned damage to the plaintiff."

I am of the view that these words are applicable to the present case. I consider that the evidence before the learned President was quite inadequate to establish that the method of toddy tapping generally practised in this country is, to borrow the words of Lord Reid at page 192 in *General Cleaning Contractors Ltd.* v. *Christmas, supra,* "so inherently dangerous that it cannot be made reasonably safe by taking proper precautions." Equally in my view there was no evidence before the court below to lead to the conclusion that any man-made safety device would prove to be a reasonably practical alternative. In fact the only suggestion as to the form such a device might take is that of the learned President himself. In the result there was no justification for his holding that employers in the toddy tapping industry are under a duty to contrive a man-made safety device of whatever nature.

I now come to the fourth ground of appeal. Counsel for the appellant conceded that the respondent fell from a coconut tree but disputed which part of the tree he fell from. There was certainly the direct evidence of the respondent himself to the effect that he fell from the top of the tree and the learned President appears to have accepted this. This ground relates to the question of the credibility of the respondent. The learned President found that on the day in question the respondent fell from a height of fifty feet because his feet slipped from an uncleaned step in the tree which had not been maintained in a proper condition. He also found that the injuries sustained by the respondent falling from such a great height were "relatively minor" because the fall had been cushioned by the pelvis of the respondent. I do not think it incumbent upon me to interfere with the learned President's finding on this score. He had the advantage of hearing and observing the respondent on the stand and had therefore a far better opportunity than I could possibly have of assessing his credibility. In any event, whether he fell from the top of the tree or from some other part of it, the learned President was clearly satisfied that his injuries were sustained as a result of his fall from the tree which fall was in turn occasioned by the uncleaned state of the steps.

With regard to the fifth ground relating to contributory negligence, I consider that there is no merit whatsoever in this ground. The cause of the fall was clearly the uncleaned state of the steps. By no stretch of the imagination can it be said that the respondent's knowledge of the risk of moss collecting on the steps on rainy days formed any part of the cause of the fall.

I propose to say nothing further on the sixth ground as I have dealt with it in conjunction with the second ground.

As to the seventh ground I am of the view that there was sufficient evidence before the learned President on which to arrive at his finding. It is clear from his decision that he gave this question full consideration and I do not consider interference with his finding in any way justified.

The eighth ground relates to the quantum of general damages. Since there was no contributory negligence no reduction is called for on this. Whilst I am of the view that this figure is slightly on the generous side, I do not consider it to be sufficiently out of line with the trend of comparable cases to warrant my interference bearing in mind that the authorities relied upon by the learned President were cases decided in 1965 and 1968 and that the decision was given in 1975.

In the light of what I have said above I find no merit in the ninth ground.

This appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *G.T. Rajan & Co.; R.K. Nathan & Co.*

CHUA HAN MOW v. SUPERINTENDENT OF PUDU PRISON

[O.C.J. (Syed Othman F.J.) November 6, 1978]
[Kuala Lumpur — Originating Applications Nos. 16 and 17 of 1978]

Administrative Law — Habeas Corpus — Applicant detained on extradition warrants — Validity of committal — Legality of committal warrants — Form of warrant — Mistake in form of warrant — Curable — Criminal Procedure Code (F.M.S. Cap. 6), ss. 366 and 422 — Extradition Ordinance, 1958, ss. 3, 3A, 5, 8, 9, 10, 11 and 14.

International Law — Extradition — Validity of committal — Legality of committal warrants — Conditions for extradition — Function of court — Surrender a matter for the Minister — Procedure to be followed by court in committal proceedings — Prima facie case — Evidence of accomplice and of agent provocateur — Form of warrant — Mistake in form of warrant curable — Criminal Procedure Code (F.M.S. Cap. 6), ss. 366 and 422 — Fugitive Criminals (Special) Extradition Act, 1977 — Extradition Ordinance, 1958, ss. 3, 3A, 5, 8, 9, 10, 11 and 14.

Criminal Law and Procedure — Habeas Corpus — Form of warrant for extradition — Mistake in form of warrant curable — Criminal Procedure Code (F.M.S. Cap. 6), s. 422.

Constitutional Law — Retrospective legislation — Procedure for extradition — Extradition Ordinance, 1958, s. 3A — Federal Constitution, art. 7(1).

Constitutional Law — Protection against retrospective criminal laws — Federal Constitution, art. 7(1).

The applicant applied for the issue of writs of *habeas corpus* to determine the legality of his detention in orders issued by the learned Presidents of the Sessions Courts for his extradition to the United States of America. The points raised on the application related to (a) the legality of the decision of the committal courts and (b) the legality of the committal warrants issued by the committal courts.

Held: (1) section 3A of the Extradition Ordinance (introduced by the Fugitive Criminals (Special) Extradition Act, 1977) gives the Minister an *ad hoc* power to deal with cases

of extradition whether or not there is a treaty for the mutual surrender of fugitive criminals. It was not the function of the court in this case to examine whether there was a valid treaty or any arrangement between Malaysia and the United States;

(2) the section is not invalid even though it has retrospective effect as it deals not with the penal nature of the offences but the procedure for extradition;

(3) the function of the court ceased after the committal of the fugutive criminal to await surrender. Surrender is a matter for the Minister and the powers and duties under section 5(1) of the Extradition Ordinance are to be exercised by the Minister and not by the court;

(4) the committal court in an extradition proceeding need only consider at the close of the hearing whether there was a *prima facie* case and this was done in this case;

(5) although the wrong form of warrant had been used, the mistake was curable under the provisions of the Criminal Procedure Code.

Cases referred to:-

(1) *In re Arton* [1890] 1 Q.B. 108.
(2) *Public Prosecutor* v. *Abdul Hamid bin Jamal* [1934] M.L.J. 93; [1933-34] F.M.S.L.R. 177.
(3) *Schtraks* v. *Government of Israel & Ors.* [1962] 3 All E.R. 529.
(4) *Public Prosecutor* v. *Ng Goh Weng & Ors.* [1979] 1 M.L.J. 127.
(5) *Re Osman bin Abdullah* [1954] M.L.J. 237, 238.
(6) *In re Bai Parvati* (1911) I.L.R. Bom. 163, 168.
(7) *Re Tan Boon Liat alias Allen & Anor.* [1977] 2 M.L.J. 108, 113-4.
(8) *Ex parte Johannes Choeldi & Ors.* [1960] M.L.J. 184, 186.
(9) *Dale's Case* (1881) 6 Q.B.D. 376, 461.
(10) *Enraght's Case* (1881) 6 Q.B.D. 376, 461.
(11) *Re Caborn-Waterfield* [1960] 2 All E.R. 178.

CRIMINAL APPLICATION.

Karpal Singh for the applicant.

Zakaria bin Mohamed Yatim, Senior Federal Counsel (*Mohamed Shafee bin Abdullah*, Deputy Public Prosecutor with him) for the respondent.

Abdul Rashid bin Abdul Manaff, watching brief for U.S. Government.

Cur. Adv. Vult.

Syed Othman F.J.: These two applications, heard together, seek the issue of writs of *habeas corpus* to produce the applicant, a Malaysian citizen, for this court to determine the legality of his detention on the orders of the learned Presidents Sessions Court (committal courts) who heard the applications by the U.S. Government for his extradition to be tried in Criminal Application No. 16/78 (first case) on 6 counts of offences relating to narcotic (dangerous) drugs under the U.S. Code and in Criminal Application No. 17/78 (second case) on 3 counts of similar offences. It is not disputed that the offences in the counts are extradition crimes. The same points of law are raised in the two cases, except that in each case there is a different additional point. In the first case, the additional point concerns the evidence of an accomplice. In the second case, it concerns the evidence of agent provocateur. The applications are accompanied by affidavits by the applicant. There is no affidavit in reply. I do not think there is need for reply as the facts are not in dispute. All the points raised are on law. The main points are: (1) the legality of the decision of the committal courts, and (2) the legality of the committal warrants issued by the committal courts. Under (1) falls various points which I propose to deal with in the numerical order of the provisions of the Extradition Ordinance.

Encik Karpal Singh, for the applicant, has urged in effect that the court should examine whether there is a valid treaty between Malaysia and the U.S. for the exchange of or for the extradition of a fugitive criminal under section 3A, and that the provision is unconstitutional in two respects: the provision of section 3A itself as such, and the fact that it has retrospective effect.

This section, introduced by the Fugitive Criminals (Special) Extradition Act, 1977, reads:

"Where a foreign country in respect of which no Order has been made under subsection (1) of section 3, or in respect of which such an order has been made but is not in force, makes a request for the extradition thereto of a fugitive criminal of that country, the Minister may personally, if he deems it fit to do so, give a special direction in writing that the provisions of this Act be applied in relation to the extradition thereto of that particular fugitive criminal as if there is in force in respect of that foreign country an order under subsection (1) of section 3."

In substance, this section empowers the Minister to give directions to apply the provisions of the Act to a foreign country, with which there is no order under section 3. Under section 3 of the Ordinance, the surrender of criminals by this country can only be made to a foreign country where an order has been gazetted following an arrangement for the mutual surrender of criminals. The provision in section 3A, to my mind, is an extension to the provision in section 3, having regard to the circumstances which exist these days. For practical purposes, it cannot be disputed that nowadays criminals have instant means of exit from one country, where they have committed crimes, to another to seek sanctuary or immunity from prosecution. The provision is, I think, the most effective means of telling the prospective criminals in other countries, particularly those involved in crimes organised on international levels, with which Malaysia has no extradition treaty, that Malaysia is no sanctuary for them. That section is intended to give the Minister an *ad hoc* power to deal with such cases whether or not there is a treaty for the mutual surrender of fugitive criminals. I cannot see anything in the Constitution which prohibits the enactment of section 3A as it stands. The power is given to the Minister. I do not consider it is the function of the court to examine whether there is a valid treaty or any arrangement between Malaysia and the U.S.

I come now to the argument that section 3A has violated Article 7(1) of the Federal Constitution by its having retrospective effect. The amending Act came into force on March 17, 1977. Section 1 of the Act provides that it shall be deemed to have come into force in respect of the Extradition Ordinance, 1958 on December 1, 1960. The article reads:

"No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed."

The constitutional provision clearly relates to an act which was not punishable by law when it was made.

It is not disputed that as at 1960 the offences in the counts preferred against the applicant in the courts were punishable by law. I am of the view that what is being related back by the amending Act is not the penal nature of the offences, but the procedure for extradition, and that the Constitution does not prohibit this.

It is also urged that before the committal courts can issue the committal warrants, they must determine whether there has been arrangement between this country and the U.S. as stated in section 5(2) of the Act, and that although the Minister may order the surrender, the court must be satisfied that the U.S. will try offences in respect of which he has been extradited. Section 5(2) reads:

"A fugitive criminal shall not be surrendered to a foreign country unless provision is made by the law of that country, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to the Federation, be detained or tried in that foreign country for any offence committed prior to his surrender other than the extradition crime proved by the facts on which the surrender is grounded."

The substance of the provision is that a fugitive criminal shall not be surrendered to a foreign country unless the conditions prescribed therein are complied with. The main functions of the court as prescribed by the Ordinance are as follows:

(a) To issue warrant of arrest on signification that requisition has been made by a foreign country according to section 7. The Magistrate is required to consider evidence to justify the issue of the warrant — section 8.

(b) To hear the case before committal — section 9(1).

(c) To receive evidence whether offence is of a political character or not of extradition crime.

(d) To commit or discharge prisoner — section 10.

(e) In case of committal to inform prisoner of his rights — section 11.

From the various provisions in the Act, it seems to me that the function of the court ceased after committal of the fugitive criminal to await surrender and the act of surrender is not a matter for the court; it is a matter for the Minister to whom the requisition for the surrender has been made. The powers and duties, expressed or implied, by section 5(2), in my view, are to be exercised by the Minister and not by the court. In *re Arton*[1] referred to by the respondent's side, it was held that the court has no jurisdiction to inquire whether the demand for surrender was made in good faith and in the interests of justice, the restriction applied only to an offence of a political character — and, if I may add, to a non-extraditable crime. In the case here, there is no suggestion that the offences have a political flavour or are non-extraditable. I do not also consider it is proper for the court here to impugn the credibility or integrity of a foreign Government seeking the extradition of a fugitive criminal by requiring it to give an undertaking that he would not be charged for offences other than those specified in the requisition. The courts here must assume that the foreign Government will honour its own requisition and will give the fugitive criminal fair and proper hearing only on the charges in the requisition, or as allowed by the courts here, and nothing else.

It is also argued that a court sitting in committal proceedings for the purpose of extradition proceedings should not follow the proceedings in a preliminary enquiry as held by the committal courts and that the extradition proceedings are a class of their own.

Our provision as contained in section 9 is about the same as the equivalent English provision. Section 9 reads:

"(1) When a fugitive criminal is brought before the Magistrate, the Magistrate shall hear the case in the same manner and have the same jurisdiction and powers, as near as may be, as if the prisoner were brought before him accused of an offence committed within his jurisdiction and triable by the High Court.

(2) The Magistrate shall receive any evidence which may be tendered to show that the crime of which the prisoner is accused or alleged to have been convicted is an offence of a political character or is not an extradition crime."

Encik Karpal Singh, in argument, seems to suggest that the observation by Thomas C.J. in *Public Prosecutor* v. *Abdul Hamid bin Jamal*[2] cannot be considered to be good law, in view of the decision of House of Lords in *Schtraks* v. *Government of Israel & Ors.*[3] He has also referred me to several other authorities which show that even in a P.E. a *prima facie* case must be established before there can be a committal. There is no need for me to refer to these authorities.

The portion of the judgment which is referred to as authority in *Schtraks* v. *Government of Israel & Ors., supra,* is at p. 533 where Lord Reid said:

... It is not in dispute that the proper test for the magistrate to apply was whether, if this evidence stood alone at the trial, a reasonable jury properly directed could accept it and find a verdict of guilty."

In *Public Prosecutor* v. *Abdul Hamid bin Jamal,* supra, which was referred to, Thomas C.J. said at page 178:

"Enactment No. 26 of 1914 deals with matters relating to extradition. By section 9(i) of that Enactment provision is made that when a fugitive criminal is brought before a Magistrate, the Magistrate shall hear the case in the same manner and have the same power as if the prisoner were brought before him accused of an offence committed within his jurisdiction and triable by the Supreme Court.

The powers of the Magistrate are, therefore, those contained in Chapter XVII of the Criminal Procedure Code. The Magistrate is thereby empowered to commit or discharge; he does not try the accused person so as to say whether he is guilty or not guilty."

The Federal Court in *Public Prosecutor* v. *Ng Goh Weng & Ors.*[4] in Federal Court Criminal Reference No. 1/78, dealing with the evidence required in a preliminary inquiry, has approved the observations of Bellamy J. in *Re Osman bin Abdullah*[5] when at page 238 he said:

"... When all the evidence has been taken, the Magistrate's duty simply is to inquire, has a *prima facie* case been made out against the accused by credible evidence? If the answer to this question is in the affirmative, then the Magistrate is bound to commit the accused for trial. On the other hand, if the answer is in the negative, the Magistrate is bound to discharge the accused, unless the evidence discloses an offence over which he has jurisdiction in which case he may either deal with it himself or order it to be tried by another Magistrate. It is no part of the inquiring Magistrate's duty to con-

sider possible lines of defence to the charge which the accused may raise in the course of the inquiry or to decide whether there are sufficient grounds for convicting the accused. That is the function of the trial court. Adopting the language of Batchelor J. in *In re Bai Parvati,*[6] it is a safe rule that where the Magistrate entertains any real doubt as to the weight or quality of the evidence, the task of resolving the doubt and assessing the evidence should be left to the court of a judge."

The decision is now binding on all courts in this country.

Going through *Schtrak's* case, *supra,* to my mind, what was said by the House of Lords is in effect the same as has been held here, particularly in *Abdul Hamid's* case, *supra.* The committal court in an extradition proceedings need only consider at the close of the hearing whether there is a *prima facie* case, bearing in mind what was said by Bellamy J. in *Re Osman bin Abdullah, supra.* As far as I can see this was done in the cases here.

As regards the evidence of accomplice in the first case (Criminal Application No. 16/78) and that of agent provocateur in the second (Criminal Application No. 17/78), the committal courts, as far as I can see, must have considered their evidence in the proceedings and their credibility before making the order of committal. It would not be proper for me to question their findings. If the applicant has any challenge as to the weight or quality of their evidence, he will have the opportunity of raising them at the trial. Lord Reid's remark in *Schtrak's* case cited above was in fact in reference to the evidence of an accomplice. I think it can also be made applicable to the evidence of an agent provocateur, assuming that the second case involves that of a real agent provocateur. I need only observe here that even in *Schtrak's* case, *supra,* Lord Reid agreed that the chief magistrate was entitled to commit on the material before him.

I have also been referred to *Halsbury's* Laws of England, Fourth Edition, Vol. 18 at p. 94 relating to extradition proceedings which reads: "The accused is entitled to call evidence before the magistrate in person or by his representative. Evidence of alibi is admissible." I agree, as in a preliminary inquiry, in an extradition proceedings the accused cannot be prevented from adducing evidence. In the cases here, there is nothing to show that the applicant was prevented from giving evidence.

It is further urged that by relying on the depositions before the grand juries in the U.S. the applicant was deprived of the right to cross-examine the witnesses who gave evidence. In answer to this, I need only refer to section 14 of the Ordinance. The relevant portion reads:

"Depositions or statements on oath taken in a foreign country, and copies of such original depositions or statements, and foreign certificates of or judicial documents stating the fact of a conviction may, if duly authenticated, be received in evidence in proceedings under this Ordinance."

The applicant himself did not choose to be present in the U.S. when the grand juries in U.S. held the proceedings resulting in the charges being preferred. He cannot complain now. The committal courts admitted the evidence according to law and were satisfied with the evidence. Despite this, I have no doubt that at the trial the applicant will still have the right to cross-examine the witnesses or to challenge the weight or quality of the evidence of any witness.

In the affidavits, the applicant also complains that the committal courts rejected his application for subpoena to be issued to the Minister. This matter was not raised in the arguments. Any way, as far as I can see, the applicant did not show what useful evidence the Minister could give for the applicant in regard to the offences the applicant was alleged to have committed. The proceedings cannot be used for the purpose of challenging the Minister's actions. For these reasons, I find that the application was rightly rejected.

I now come to main point (2), the legality of the committal warrants issued by the committal courts at the conclusion of the proceedings. The form of the warrant of committal as prescribed in Form D of the Second Schedule to the Act is as follows:

"FORM D

FORM OF WARRANT OF COMMITTAL.

To ..... Police Officer, and to the Officer in Charge of the Prison at .....

WHEREAS on this ..... day of ..... 19.....

late of ..... is brought before me, a Magistrate of the First Class, to show cause why he should not be surrendered in pursuance of the Extradition Ordinance, 1958, on the ground of his being accused (or convicted) of the commission of the crime of .....

within the jurisdiction of .....

AND whereas no sufficient cause has been shown to me why he should not be surrendered in pursuance of the said Ordinance:

This is, therefore, to command you, the said Police Officer, forthwith to convey and deliver the said ..... into the custody of the Officer in Charge of the Prison at ....., and you the said Officer in Charge of the Prison, to receive the said ..... into your custody and him there safely to keep until he is thence delivered pursuant to the provisions of the said Ordinance, for which this shall be your warrant.

Given under my hand and seal at ..... this ..... day of ..... 19.....

.....

Magistrate of the First Class.

(L.S.)"

The committal warrants issued by the committal courts are different in form. They apparently followed the ones prescribed under the Criminal Procedure Code. I need only set down the one in respect of the first application. It is as follows:

"Malaya

State of Federal Territory

In the Sessions/Magistrate Courts at Kuala Lumpur

Criminal Case No. Misc. Cr. App. 1/78.

WARRANT OF COMMITMENT TO CUSTODY PENDING TRIAL.

To the Officer in Charge of Prison at : Pudu, Kuala Lumpur.

WHEREAS Chua Han How of Bukit Bunde Kemaman is/are charged with Smuggling Drugs to U.S.A. and has been committed.

Until extradition to United States of America.

You are hereby required to receive the said Chua Han Mow into your custody and to produce before the said court when so required.

Dated at Kuala Lumpur this 7th day of April, 1978.

The Seal of the Sessions Court, Kuala Lumpur.

Sd. .....
Senior President,
Sessions Court,
Kuala Lumpur."

The other committal warrant is about the same.

Encik Karpal Singh submits that the committal warrants are illegal, as they do not follow the form prescribed by the Extradition Ordinance, the detention is therefore unlawful, and the writs sought should be issued; the committal courts have ignored section 19 of the Ordinance, which provides that the Forms set out in the Second Schedule may be used in all matters to which such forms refer. It is argued that although the word "may" is used in the section, it must be construed as "shall" having regard to the particulars required to be shown in the prescribed form; the detention on the warrants, being illegal, entitles the applicant to damages to civil action. I shall deal with those authorities referred to which I consider to be relevant to the points raised.

For the respondent, it is argued that the omission to use Form D is a mere irregularity and cannot be an illegality, as the applicant knew that he was being detained as a result of the hearings.

In *Re Tan Boon Liat @ Allen & Anor.*[7] Lee Hun Hoe C.J. (Borneo) at p. 113-4 said:

"... preventive detention is a very serious invasion of personal liberty. Certain safe-guards are provided by law for the protection of the subject and must be followed scrupulously. Where statutory requirements have to be complied with there must be strict compliance since it affects matters of such fundamental importance as the liberty of the subject. In *Ex parte Johannes Choeldi & Ors.*[8] Rigby J. said to the effect that where personal liberty is concerned an applicant in applying for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. Where the detention is not in accordance with law such detention is bad and the person is entitled to be released forthwith. The executive may decide to arrest him on his release and the process starts all over again. The court is not concerned with such matters at this stage. The function of the court is to interpret the law in accordance with established principles of construction."

In *Dale's* case[9] and *Enraght's* case[10] at p. 461 Brett L.J. said:

"Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."

In *Re Caborn-Waterfield,*[11] in 1955 the applicant was summoned to appear before a criminal court in France on a charge of larceny. He did not attend the court and was convicted in his absence and sentenced to four years by a process of French law known as "jugement par defaut". In 1956 he gave notice under French law to have the judgment set aside and the case retried in his presence. He again failed to appear on the day he was summoned and the conviction and sentence were confirmed. In 1960 he was arrested in London on a warrant which recited that requisition had been made for the surrender of the applicant "suspected and accused of the commission of the crime of larceny within the jurisdiction of the Government of France." The applicant came before the magistrate who committed him to prison "on the ground of his being accused of the commission of larceny" in France. It was held that the applicant would be discharged from custody since the warrant of arrest or the warrant of committal wrongly described him as "accused" of larceny when by the "jugement iteratif défaut" he was a convicted person. The judgment did not indicate the terms of the requisition for surrender. The mistake might have occurred in the requisition for the surrender or it might have been in the warrant of arrest not following the requisition for surrender, assuming that the requisition did specify that the applicant had been convicted. In any case, on either consideration, in my view, the mistake went to the root of the matter and rendered the subsequent proceedings to be bad.

In *Ex parte Johannes Choeldi & Ors., supra,* Rigby J. said at page 186 that the order for removal and consequently the detention of the applicants were bad in law, because the Controller of Immigration in stating in the order of removal that the grounds for the issue of the order were that the applicants, by overstaying the duration of their pass, had committed an offence against section 15(1) of the Immigration Ordinance, had prejudged the issue and unintentionally usurped the functions of a trial court in deciding whether or not such offence had in fact been committed.

I need only observe here that Rigby J.'s reasons can hardly be said to be technical.

The significant features in the two immediate cases cited are that the processes were bad *ab initio.* In the present case, the position is somewhat different. There is no suggestion that the U.S. Government who made the requisition for surrender have not followed all steps required by law. After arrest there were in fact proper hearings resulting in the committal. What is said to be wrong is only in the committal warrants. The committal courts did not use Form D in the Second Schedule to the Ordinance. But it cannot be disputed that the applicant knew the reasons for his detention. Further in each case, after hearing, the committal courts, in addition to the committal warrants, issued orders in the following form:

"This application came up for hearing on the 2nd day of February, 1978 and it was finally concluded on this day in the presence of....

AND UPON READING ... AND UPON HEARING counsel as aforesaid IT IS ORDERED that the respondent be committed to Pudu Prison, Kuala Lumpur and there to await the Warrant of the Minister for his surrender to U.S.A."

No doubt the Extradition Ordinance sets out the procedure of extradition proceedings and the Criminal Procedure Code sets out the procedure of criminal proceedings. But in the final analysis the determination of a *prima facie* case is the same. In any case, since *habeas corpus* proceedings are contained in the Criminal Procedure Code (the Code) (see Chapter XXXVI, sections 365-375, of the Code), I am of the view that provisions of the Criminal Procedure Code apply to *habeas corpus* proceedings. In dealing with matters or instruments relating to *habeas corpus* proceedings, the appropriate provisions of the Code can

be invoked. By section 366 of the Code, so far as applicable to the present case, the ground which the applicant is required to satisfy the court is that his detention is without just cause. The function of the court is merely to determine this. In amplification, the first part of headnote (ii) in *Schtrak's* case, *supra*, reads:

"the proceedings for *habeas corpus*, subsequent to the chief magistrate's committal order, were not an appeal or re-hearing, but the court's function in them was to see whether the prisoner was lawfully detained (e.g. whether there had been jurisdiction to make the order), and the position was analogous to that where a person was committed by justices in England for trial on indictment;"

The position of the applicant here is as if he had been committed for trial in the High Court. Since the applicant knows the reasons for his committal, I am of the view that his detention cannot be without just cause. Illegality of detention can only arise if the detention has been effected without just cause. A detention warrant is a mere formality.

Taking what is relevant to the present case, section 422 of the Code provides "... no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account — of any error, omission or irregularity in the ....., ..., warrant, ..., or in any inquiry or *other proceeding* under this Code; or .... unless such error, omission, ..., irregularity, ... has occasioned a failure of justice." I have italicized the words "other proceeding" to stress that *habeas corpus* proceedings should fall under the expression. If the warrant of arrest and the committal warrant in *Re Caborn-Waterfield, supra*, and the detention order in *Ex parte Johannes Choeldi & Ors., supra*, had been considered under section 422 of the Criminal Procedure Code, it should have been obvious that they contained fatal errors occasioning a failure of justice. But the processes in these two cases cannot be equated with the committal warrants in the present case. In the two cases, the fatal errors occurred from the start. In the present case, the committal warrants were the tail end of the extradition proceedings, after requisition, arrest and hearing which were all proper. I am of the view that the technical defects which Rigby J. in *Ex parte Johannes Choeldi & Ors., supra*, had in mind were such as would have occasioned a failure of justice. In the light of the express provision of our Criminal Procedure Code, they should be, in effect, mistakes which are not curable. Where an error is curable, the court, I should think, is duty bound to cure it so as to serve the cause of justice. In the cases here, the omission by the committal courts to use Form D. I find, is certainly curable by the simple expedient of directing them to issue committal warrants as in Form D. I hereby so direct them.

The applications are dismissed.

Application dismissed.

Solicitors: *Karpal Singh & Co.; Ariffin & Ooi.*

PUBLIC PROSECUTOR v. MOHAMED FATHI BIN HAJI AHMAD

[R.Cr.J. (Harun J.) November 6, 1978]

[Kuala Lumpur — Federal Territory Criminal Revision No. 8 of 1978]

Criminal Law and Procedure — Charge — Duplicity — Four distinct offences in one charge — Irregularity — Whether it could be cured — Criminal Procedure Code (F.M.S. Cap. 6), ss. 153, 163, 165, 173 & 422 — Penal Code, ss. 465 & 471.

Forgery — Accused forged Air Travel warrants to obtain overdraft from bank — Penal Code, ss. 465 & 471.

The accused in this case was a partner of a travel agency. As manager he was responsible for the financial affairs of the firm. The firm sold airline tickets to passengers. These tickets were obtained from the various airlines on credit but payable within 15 days. The firm which dealt solely with government and statutory bodies found payments by them rather slow and made well after the credit period allowed by the airlines so the accused made arrangements with the firm's bankers for overdraft facilities up to the limit of one million ringgit. This facility could only be used by the firm on production of the Air Travel Warrant to the bank.

The firm ran into financial difficulties. To overcome these, the accused used forged Air Travel warrants purportedly issued by the Customs Department. This was presented to the bank for payment. Subsequently the forgery was discovered and the accused was arrested and charged in court. Four charges preferred against him were later reduced to three amended charges. These three amended charges were "telescoped" into a single charge to which he pleaded guilty. The charge read:

"That you sometime between the 16th day of August, 1977 and 26th day of September, 1977 at the Chase Manhattan Bank, Jalan Gereja, Wilayah Persekutuan, Kuala Lumpur, fraudulently used as genuine four documents, to wit, Waran Perjalanan Udara Awam Nos. 9036, 9089, 19032 and No. 19040, which you knew to be forged documents and that you thereby committed an offence under section 471 and punishable under section 465 of the Penal Code."

The learned Magistrate did not record a conviction but acted under section 173A of the Criminal Procedure Code and bound the accused to be of good behaviour for three months. On appeal the High Court found the charge bad for duplicity. The issue was therefore whether the non-compliance with section 163 amounted to an illegality or an irregularity.

Held: (1) the charge though bad for duplicity was an irregularity which was cured by section 422;

(2) the Order under section 173A, Criminal Procedure Code was inappropriate and manifestly inadequate in this case. The accused should, instead, be fined $10,000 in default two years' imprisonment under section 471 read with section 465 of the Penal Code.

Cases referred to:-

(1) *Cheong Sik Kwan* v. *Public Prosecutor* [1959] M.L.J. 189.

(2) *Public Prosecutor* v. *Leong Yoon Meow* [1953] M.L.J. xxxv.

(3) *Public Prosecutor* v. *Syed Bakri* [1955] M.L.J. xvii.

(4) *Public Prosecutor* v. *Low Ah Sang* [1962] M.L.J. 13, 15.

(5) *Mee Lian Co.* v. *Public Prosecutor* [1962] M.L.J. 131.

(6) *See Yew Poo* v. *Public Prosecutor* [1949] M.L.J. 131.

CRIMINAL REVISION.

Wan Abdul Majid bin Wan Hamid (Deputy Public Prosecutor) for the applicant.

Hassan bin Ishak for the respondent.

Cur. Adv. Vult.

Harun J.: The accused is a partner of a travel agency. In his capacity as manager, he is responsible